ELCORP RESOURCES SDN BHD & ANOR

v.

PERBADANAN PUTRAJAYA & ANOR

HIGH COURT MALAYA, SHAH ALAM
FAIZA TAMBY CHIK J
[SUIT NO: 22-644-98]
2 NOVEMBER 1998

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Performance bond - Interlocutory injunction to restrain beneficiaries from receiving monies under a performance bond - Whether could be granted - Principles - Whether inequitable for beneficiaries to call on bond - Serious issues - Balance of convenience*

CONTRACT: *Performance bond - Joint beneficiaries - Interlocutory injunction to restraint beneficiaries from receiving monies - Whether bond unconditional - Whether bank obliged to pay on demand - Disputes relating to contract pending arbitration - Whether status quo to be preserved*

The plaintiffs had contracted to construct 400 units of low cost houses for the second defendant ('the Contract') and had secured a performance bond for the latter ('the Bond'). Subsequently, the Bond was amended and the first and second defendants became the joint beneficiaries thereof. The second defendant alleged that the plaintiffs were in breach of the contract and so terminated the plaintiffs' employment on that ground. The plaintiffs averred however that the termination was invalid and had the matter referred to arbitration.

Paragraph 2(a) of the Bond stipulates that the guarantor/bank would release the bonded monies to the beneficiaries upon breach of the Contract by the plaintiffs. That being the case, on 23 February 1998, whilst arbitration proceedings aforesaid were pending, the second defendant made a demand to the bank for payment of the monies ('the first Demand'). The First Demand, however, was rejected on the ground that it was not a joint demand and was bad in law. The second defendant then executed a Supplementary Agreement with the plaintiffs, promising thereby to withdraw the First Demand and not to make a fresh demand on the Bond. The second defendant's promise notwithstanding, on 7 March 1998, the first defendant issued a demand to the bank ('Second Demand') and claimed payment on the Bond.

The plaintiffs sought to maintain the *status quo* pending the determination of the arbitration proceedings, and so applied for an interlocutory injunction to restraint the defendants from receiving the bonded monies. Before the learned judge, the defendants argued that the application for injunction ought to be dismissed as (i) the plaintiffs' statement of claim did not disclose a cause of action; (ii) the Bond was an unconditional bond and the bank was therefore obliged to pay on demand; (iii) there were no serious questions to be tried; and (iv) the balance of convenience lay in the defendants' favour.

Held:

[1] The plaintiffs were disputing the purported termination of their employment and had also alleged that the second defendant was in breach of contract. The facts also showed that the parties had since referred the dispute to arbitration, and the proceedings therein were pending with the parties currently exchanging their respective pleadings. In the circumstances, it is untenable for the second defendant to say that the plaintiffs had no cause of action against them. The plaintiffs, clearly, had pleaded a valid and serious cause of action against the second defendant which is pending arbitration.

[1a] The defendants had adopted an incorrect procedure in seeking to challenge the plaintiffs' application. If the defendants had actually believed that the plaintiffs had no cause of action against them, the proper procedure was for them to adopt and invoke O. 18 r. 19 or O. 33 r. 2 Rules of the High Court 1980. This was not done.

[2] The Bond is conditional upon the plaintiffs' default by virtue of para. 2(a) therein. Since the Bond is a conditional bond, the underlying Contract between the parties became relevant and could not be disregarded by the court.

[2a] An injunction ought to be granted where it is unconscionable and inequitable to call on a performance bond. In the present case, the very essence of the Contract is in dispute and is pending arbitration proceedings and the plaintiffs, clearly, would suffer prejudice and be financially crippled if the monies were released. The defendants, on the other hand, would still be able to call on the bond if so found to be entitled after arbitration proceedings. It is to be noted, however, that, where there is an allegation of unconscionable conduct there is no need to consider the balance of convenience.

[3] It is clear that the Bond is conditional. It is also clear that the First Demand was invalid and rejected by the bank. Consequently, the Second Demand is also invalid by reason of the failure of the first defendant to state that the plaintiffs were in default. On the facts, the reference by the first defendant that the plaintiffs were in breach of the contract was clearly misconceived.

[4] The issues raised by the facts relating to the dispute of the purported termination of the plaintiffs' employment, namely, the lack of bona fides on the part of the defendants and the unconscionable conduct of the defendants, constituted serious issues to be tried in the arbitration proceedings which had already commenced.

[5] The plaintiffs had satisfied the principles for the grant of an injunction. Bearing in mind the aforesaid issues, particularly the fact that the validity of the termination of the plaintiffs' employment had been contested and arbitration proceedings thereon were pending, the defendants are not entitled to call on the Bond. The balance of convenience also lies in the plaintiffs' favour and the *status quo* should be preserved pending the final disposal of the arbitration proceedings.

[Order in terms of application.]

Cases referred to:

Alor Janggus Soon Seng Trading Sdn Bhd v. Sey Hoe Sdn Bhd [1995] 1 CLJ 461 ***(foll)***

American Cynamid Co v. Ethicon Ltd [1957] AC 396 ***(foll)***

Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd [1995] 1 CLJ 283 ***(refd)***

Potton Homes Ltd v. Coleman Contractors Ltd [1984] 28 BLR 19 ***(refd)***

Radio & General Trading Co Sdn Bhd v. Wayss & Freytag (M) Sdn Bhd [1998] 1 MLJ 346 ***(refd)***

Rimbunan Hijau Sdn Bhd v. Sarawak Plywood (M) Bhd [1985] 1 CLJ 424 ***(refd)***

Royal Design Studio Pte Ltd v. Chang Development Pte Ltd [1991] 2 MLJ 229 ***(refd)***

Teknik Cekap Sdn Bhd v. Public Bank Bhd [1995] 4 CLJ 697 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 15 r. 6(1), (2), O. 18 r. 19, O. 33 r. 2

For the 1st & 2nd plaintiffs - Akbardin Abdul Kader (Vasdev Bakshani & S Murthi with him); M/s Akbardin & Co & Vasdev Bakshani

For the 1st defendant - Karen Goonting; M/s Zaid Ibrahim & Co

For the 2nd defendant - Shahrul Hamid Amirudin (T Kohendran with him); M/s Albar Zulkifly & Yap

Reported by WA Sharif

JUDGMENT

Faiza Tamby Chik J:

The plaintiffs' application in lampiran (4) is for, *inter alia* an interlocutory injunction to restrain the defendants from calling upon or receiving any monies under a performance bond ("the Performance Bond" secured by the plaintiffs pursuant to an agreement between the second defendant and the plaintiffs dated 24 November 1997 ("the Contract").

The second defendants are the developers of the project known as Putrajaya. By the Contract, the second defendant appointed the plaintiffs as the contractors for a project involving the construction of 400 units of low cost flats at Putrajaya on a "design and build" basis at a total cost of RM13,120,000 ("the Contract Sum") (The Contract is marked as exh. "Z-1" in encl. 2 and 3 and exh. "Z-12" in encl. 9). Pursuant to the Contract, the plaintiffs secured the performance bond in the sum of RM1,312,000 representing 10% of the Contract Sum. (The Performance Bond is at p. 184-187 (exh. "Z-1") in encl. 2). Both the defendants have made a demand to the bank to release the sum of RM1,312,000 secured by the performance bond to the first defendant on or before 1 June 1998. The second defendant's demand dated 23 February 1998 is at exh. "Z-9" in encl. 3. The first defendant's demand dated 7 March 1998 is at exh. "Z-11" in encl. 3.

The plaintiffs contend that the second defendant is in breach of the Contract, *inter alia*, due to a purported termination of the plaintiffs' employment by the second defendant on 21 February 1998 when the project was 88% complete and the defendants are not entitled to call upon or receive the monies under the Performance Bond. The grounds of the plaintiffs' contention is stated in para. 27 of the statement of claim. The purported letter of termination dated 21 February 1998 is at exh. "Z-7" in encl. 3.

The parties have referred the dispute relating to the validity of the termination to arbitration and arbitration proceedings have commenced and the parties are now exchanging their respective pleadings pursuant to directions given by the appointed arbitrator. The pleadings relating to the arbitration proceedings are expected to be closed on or before 19 November 1998.

The issues to be determined at the arbitration proceedings are:

(a) Whether the defaults specified by the second defendant in their letter dated 5 February 1998 were genuine defaults of the plaintiffs, and, if so, were the plaintiffs in breach of the said notice. The letter dated 5 February 1998 is at exh. "Z-6" in encl. 3.

(b) Whether the purported termination of the plaintiffs' employment under the Contract was based on reasonable, justified and valid grounds.

(c) Whether the demands made by the defendants are valid in light of the second defendant's breach of Contract.

(d) Whether the defendants are in breach of the supplementary agreement dated 5 March 1998 by not issuing instruction to the bank to withhold payment of the monies after the demand dated 23 February 1998. The supplementary agreement dated 5 March 1998 is at exhibit "Z-10" in encl. 3.

(e) Whether the demand made by the first defendant is valid in light of the second defendant's breach of the supplementary agreement.

(f) Whether the demand made by the second defendant dated 23 February 1998 ("First Demand") is valid in light of the second defendant's averment in para. 18 of the affidavit of Nur Ismail Mohammed affirmed on 11 June 1998 that the second defendant had assigned the performance bond to the first defendant.

(g) Further to (f) above, whether the second defendant had misrepresented to the plaintiff's and/or acted in bad faith in maintaining that they had the right to make the call on the Performance Bond at the time the supplementary agreement was entered into while now saying that they had assigned the performance bond to the first defendant. In fact, the demand made by the second defendant is *ex facie* invalid and was rejected by the bank pursuant to their letter dated 9 March 1998 enclosed as exh. "NIM-17" in the affidavit of the Nur Ismail Mohammed affirmed on 11 June 1998.

(h) Whether the demand made by the first defendant dated 7 March 1998 ("Second Demand") referring to the First Demand, is valid in light of the fact that the said First Demand was found by the bank to be invalid and was rejected. The Second Demand is annexed as exh. "Z-11" in encl. 3.

(i) Whether the purported termination of the plaintiffs' employment is unconscionable and made in bad faith as a result of the following:

(i) the project was already 88% completed;

(ii) the purported termination was made on baseless and unjustified grounds;

(iii) any delay in the completion of the project was for reasons beyond the plaintiffs' control;

(iv) the plaintiffs were in any event entitled to the extension of time up to 1 April 1998 granted by the State Secretary on 12 February 1998. The minutes of the meeting at the State Secretary's office is in exh. "Z-5" in encl. 3.

(v) After 12 February 1998, the second defendant granted an extension of time retrospectively to the plaintiffs up to 10 January 1998 to complete the project. The Certificate of Delay & Extension of Time No. 1 is annexed as exh. "Z-3" in encl. 3.

(vi) There were no previous notices of default issued to the plaintiffs' which the plaintiffs had neglected.

The plaintiffs, through a letter dated 26 February 1998 issued by their solicitors, objected to the purported termination of their employment and gave a detailed response to the allegations made by the second defendant and their grounds for the termination. The letter dated 26 February 1998 issued by the plaintiffs' solicitors is at exh. "Z-8" in encl. 3.

The Law

The plaintiffs/applicants are seeking an interlocutory injunction against the beneficiary of the Performance Bond and not the bank. The plaintiffs are not prevented from seeking an injunction against the beneficiary arising out of an alleged invasion of the right of the plaintiffs/applicant under the Contract. In *Esso Petroleum Malaysia Inc. v. Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149 the Supreme Court said at p. 158 G:

> However, in the instant appeal, the interlocutory injunction is not against Bank Bumiputra but against the beneficiary of the said performance bonds in an action against the same beneficiary, i.e. the buyer, so that Bank Bumiputra was in fact similarly restrained understandably for fear of the contempt proceedings. In our view, further, Bank Bumiputra was not a party to the underlying Contract or Contract between the buyer or seller. The right of the seller to the ancillary relief of an interlocutory injunction could arise out of such alleged invasion of the right of the seller, i.e. the Plaintiff, by the buyer, i.e the Defendant, under the said contracts between the seller and the buyer. Therefore, despite the resulting effect that it would restrain Bank Bumiputra, it could not prevent the seller from applying for an interlocutory injunction.

In the *Radio & General Trading Co Sdn. Bhd v. Wayss & Freytag (M) Sdn Bhd* [1998] 1 MLJ 346 the court held:

> Therefore while an injunction cannot be issued against a bondsman – in this case, the bank – the plaintiff could not be prevented from applying for an interlocutory injunction against the beneficiary of the bond. Also, in this case, the obligation to honour the performance bond notwithstanding contest or protest, lay with the bank. However the beneficiary here could be restrained from receiving the monies as it had not complied with the conditions of the Contract regarding the call on the bond. (See p. 357 D-H)

The Issues Raised By The First Defendant

The first defendant's arguments can be summarised as follows:

(i) that the plaintiffs' statement of claim does not disclose a cause of action against the first defendant,

(ii) that the Performance Bond in this case is an unconditional bond and that the bank is obliged to pay on demand in the absence of fraud;

(iii) that, in the event that the performance bond in this case is found to be conditional, the bank is still obliged to pay on demand as the plaintiffs have admitted their breach of the Contract;

(iv) that there are no serious questions to be tried; and

(v) that the balance of convenience lies in favour of the defendants.

The Issues Raised By The Second Defendant

The second defendant's arguments can be summarised as follows:

(i) that the Performance Bond in this case is an unconditional bond and that the bank is obliged to pay on demand in the absence of fraud;

(ii) that, in the event that the Performance Bond in this case is found to be conditional, the bank is still obliged to pay on demand as the plaintiffs have admitted their breach of the Contract;

(iii) that there are no serious questions to be tried; and

(iv) that the balance of convenience lies in favour of the defendants.

The First Argument Of The First Defendant: No Cause Of Action Against The First Defendant

This argument is misconceived as a close perusal of the plaintiffs' statement of claim will show that the plaintiffs are disputing the purported termination of their employment by the second defendant and, consequently, that the second defendant has committed a breach of the Contract. Following from this, the plaintiffs and the second defendant have referred the dispute to arbitration and at this moment, arbitration proceedings have actually commenced, with the parties currently exchanging their respective pleadings. It is in light of the ongoing arbitration proceedings that the plaintiffs are seeking that the *status quo* be preserved.

In *Rimbunan Hijau Sdn Bhd v. Sarawak Plywood (M) Bhd* [1985] 2 MLJ 277 Tan Sri Syed Agil Barakbah, SCJ said at p. 379:

> An injunction is a form of judicial relief whereby the court orders a party to the proceedings whether to refrain from doing specified acts or to do certain specified acts. An interlocutory injunction may be granted if it appears to the court to be just or convenient so to do in order to safeguard the position of one of the parties until his rights can finally be determined at the trial of the action. Section 13(6) of the Arbitration Act (hereinafter referred to as "the Act") empowers the High Court to grant an interim injunction or to appoint a Receiver in a proper case and it was under this statutory provision of the Act that the appellants were asking the learned judge to exercise his jurisdiction, pending the determination of the disputes of the parties by arbitration. Since the appointment of an arbitrator had been made, we are of the opinion that in the exercise of his discretionary statutory power under Section 13(6)(h) of the Act the main consideration of the court is whether or not the *status quo* ought to be preserved.

It is now pertinent to scrutinise the involvement of the first defendant to show why they were named as a party to the action. Originally, the Performance Bond was secured by the plaintiffs in favour of the second defendant as the wording of the Bond clearly shows. (Page 185 of encl. 2). By a letter dated 30 July 1997 annexed to the Main Contract, the bank had acknowledged that the Bond was amended to reflect the first and second defendants as joint beneficiaries, while expressly stating that all other terms of the original Bond remained unchanged. Following the purported termination of the plaintiffs' employment on 21 February 1988, the second defendant made a demand on the bank dated 23 February 1998 for payment ("the First Demand"). (Exhibit "Z-9" in encl. 3). Subsequently, the plaintiffs and the second defendant entered into the supplementary agreement dated 5 March 1998 which, *inter alia* provided that the second defendant would withdraw their demand dated 23 February 1998 and would not make a fresh demand on the Bond for two (2) months, ie until 4 May 1998 (Exhibit "Z-10 in encl. 3). It must be stressed that at that material time, the second defendant had continuously represented that they had the sole right to make a demand on the Bond and no mention was made whatsoever that they had assigned the Bond to the first plaintiff.

Following the supplementary agreement, the first defendant issued a demand to the bank dated 7 March 1998 and received by the bank on 18 May 1998 ("the Second Demand"). (Exhibit "Z-1" in encl. 3). The demand expressly referred to the First Demand and also claimed payment on the bond. It now transpires that the first defendant had issued the Second Demand after the bank had refused to pay against the First Demand as it was bad. Presumably, the bank required a joint demand. The second defendant has now made a bare averment in their affidavit claiming that the bond had been assigned to the first defendant without offering any tangible evidence of such an assignment and the plaintiffs have no knowledge of such an assignment.

Therefore from the sequence of events aforementioned it can be observed that the second defendant had acted in bad faith in representing to the plaintiffs that they had the sole right to make the call at the time the supplementary agreement dated 5 March 1998 was entered into. The bare averment that the Bond had been assigned to the first defendant and this is done without proof of any kind.

It must be noted that the plaintiffs have pleaded a valid and serious cause of action against the second defendant which is pending determination by arbitration. By making a demand to the bank for payment on the Bond and by purporting to be a beneficiary of the monies under the Bond, the first defendant necessarily becomes a party to the action and is properly enjoined within the meaning of O. 15 r. 6(1) and (2) of the Rules of the High Court 1980 as they would be affected by the relief granted by the Honourable Court. I am of the view that if the first defendant had actually believed that the injunction against them cannot be sustained, they should have filed an application to strike out the suit against them under O. 18 r. 19 RHC 1980 which would have the effect of setting aside the injunction obtained. No such application has been made to date by either of the defendants.

In *Alor Janggus Soon Seng Trading Sdn Bhd v. Sey Hoe Sdn Bhd* [1995] 1 CLJ 461 the Supreme Court held:

> If the respondents were so sure that the appellants had no *locus standi* or cause of action, the correct procedure is for them to invoke O. 18 r. 10 or O. 33 r. 2 RHC 1980 because if they succeed in their applications on any of those orders, the civil suit and the injunction itself would both collapse.

The remainder of the arguments of the first and second defendants:

(i) That the performance bond in this case is an unconditional bond and that the bank is obliged to pay on demand in the absence of fraud.

(ii) That even if the performance bond in this case is conditional, the bank is obliged to pay on demand as the plaintiffs have admitted their breach of Contract.

I am of the view that in the present case the Performance Bond is conditional upon the default of the plaintiff The relevant words in para. 2(a) of the Performance Bond which is at p. 184 of exh. "Z-1" in encl. 2 states:

> If the Contractor shall in any respect fail to execute the Contract or commit any breach of his obligations thereunder, then the Guarantor shall pay ...

A phrase similar to the above has been interpreted by the Court of Appeal in the case of *Teknik Cekap Sdn Bhd v. Public Bank Bhd* [1995] 3 MLJ 449 to mean that such a bond is a conditional Bond. The Court of Appeal stated at p. 455 H as follows:

> Now from the very wording of the bond itself, it is clear and unequivocal that what would trigger off the guarantee is the sub-contractor's failure to execute the Contract or commit any breach thereof. Then, and only then, would the liability of the guarantor arise. Therefore, giving the words in the bond their plain meaning, it cannot, by any stretch of imagination be said that the bond in the circumstances of this case is an unconditional bond.

Since the Performance Bond in this case is undoubtedly a conditional bond, the underlying Contract between the parties become relevant and must not be disregarded. In considering such an application, the court must consider the facts of each case.

In *Royal Design Studio Pte Ltd v. Chang Development Pte Ltd* [1991] 2 MLJ 229 the Singapore High Court held:

> The court in determining the Defendant's entitlement to call on the performance bonds is concerned with the relationship between the parties under the main or underlying Contract they have made and the dispute arising from such relationship and not whether the bond is binding on the bank or insurance company that issued it. In such cases, there is no reason why the court should be inhibited from exercising its equitable jurisdiction and restraining the defendant from calling on the bond, if the facts warrant it, merely because the bond is like a letter of credit.

In *Potton Homes Ltd v. Coleman Contractors Ltd* [1984] 28 BLR 19 Eveleigh CJ said (at p. 22):

> For a large construction project, the employer may agree to provide finance (perhaps by way of advance payments) to enable the contractor to undertake the works. The contractor will almost certainly be asked to provide a performance bond. If the contractor were unable to perform because the employer failed to provide the finance, it would seem wrong to me if the court was not entitled to have regard to the terms of the underlying Contract and could be prevented from considering the question whether or not to restrain the employer by the mere assertion that a performance bond is like a letter of credit.

An injunction ought to be granted where it is unconscionable and inequitable to call on the Performance Bond. In the present case, the very essence of the Contract is in dispute and is pending arbitration proceedings. The plaintiffs would suffer prejudice and could be financially crippled if the monies are released. On the other hand, the defendants would still be able to call on the Bond if so found to be entitled after arbitration proceedings. In the *Radio & General Trading Co Sdn Bhd v. Wayss & Freytag (M) Sdn Bhd* [1998] 1 MLJ 346 at p. 347B where it was held:

> The defendant would not be unduly prejudiced by the grant of the injunction as the subject matter at issue was a performance bond issued by a bank. If the arbitration decides that the defendant was entitled to the bond, payment can still be made. The only damage suffered by the defendant would be the loss of the

> use of the monies secured by the bond or whatever was due to the defendant which can be recovered by a civil action. If the injunction was not granted, the bank would be obliged to pay the debt and recover the same from the plaintiff, who in turn can only recover from the defendant after the arbitration proceedings are concluded (see pp. 3571 and 358A-B).
>
> The injunction granted was confined to restraining the defendant from receiving monies under the performance bond until the disposal of the arbitration proceedings (see p. 358C).

It is clear that the Performance Bond in this case is a conditional bond as stated above. It is also clear that the First Demand made by the second defendant is invalid and was rejected by the bank. Consequently, the Second Demand is also invalid by reason of the failure on the part of the first defendant to state that the plaintiffs were in default. In *Teknik Cekap Sdn Bhd v. Public Bank Bhd* [1995] 4 CLJ 697; [1995] 3 MLJ 449, the Court of Appeal held:

> As the performance bond was a conditional bond, the letters of demand calling for payment of the bond had to assert the basis of the claim, i.e. that Lightweight had breached or failed to perform the Sub-Contract. Since Teknik had failed to do so in its letters, the letters of demand were invalid. Consequently, any payment made thereunder by PBB was also invalid and ought to be returned.

It must be noted that the reference made by the first defendant to show that the plaintiffs had admitted a breach of the Contract was misconceived as it was clear from the letter dated 17 February 1998 that the plaintiffs were saying that they were aware of the situation and that they would be taking the necessary steps to remedy the defects. In any events, the purported termination of the plaintiff's employment was not based on the plaintiffs' letter or the circumstances surrounding the said letter as the second defendant did not act to terminate the plaintiffs on the basis of the plaintiff's so called admission.

That There Are No Serious Questions To Be Tried. That The Balance Of Convenience Lies In Favour Of The Defendants

It must be noted that where there is an allegation of unconscionable conduct, there is no need to consider the balance of convenience. In *The Radio & General Trading Co Sdn Bhd v. Wayss & Freytag (M) Sdn Bhd* [1998] 1 MLJ 346 at p. 347:

> It is plain therefore that the call on the performance bond is inequitable.
>
> The decision on the Royal Design Studio came up for scrutiny by the Singapore Court of Appeal in *Bocotra Construction Pte Ltd v. A-G (No 2)* [1995] 2 SLR 733 (CA). Whilst declining to overrule the decision of Thean J, the Court of Appeal held at p. 746:

> In our opinion, whether there is fraud or unconscionability is the sole consideration in applications for injunctions restraining payment or calls on bonds to be granted. Once this can be established, there is no necessity to expend energies in addressing the superfluous question of balance of convenience.

Applying this guideline, I find that it is unconscionable on the part of the defendant in this case to call on the performance bond.

It can be seen that the issues raised by the facts of the present case relating to the dispute of the purported termination of the plaintiff's employment, the lack *bona fides* on the part of the defendants and the unconscionable conduct of the defendants are serious issues to be tried in the arbitration proceedings which have already commenced.

The principles involved in the grant or refusal of injunction as explained in the case of *American Cynamid Co v. Ethicon Ltd* [1957] AC 396 and considered by our Supreme Court in the case of *Alor Janggus Soon Seng Trading Sdn Bhd v. Sey Hoe Sdn Bhd* [1995] 1 CLJ 461 can be summarised as follows:

(i) Firstly, the plaintiffs' case must raise serious issues to be tried;

(ii) The trial of the main suit (or arbitration, as in this case) must proceed to show that the plaintiffs are genuinely concerned to pursue their claim to trial;

(iii) The plaintiffs are seeking the injunction to maintain *status quo* pending the trial (or arbitration proceedings).

Having found the above elements, the following guidelines must be invoked by the court:

(i) whether damages are an adequate remedy;

(ii) where does the balance of convenience lie;

(iii) are there any "special factors"

I am of the view that the plaintiffs have adequately satisfied the principles for the grant of an injunction being the relief prayed for. In light of the issues outlined above and particularly the fact that the issue of the validity of the termination of the plaintiffs' employment is being hotly contested and arbitration proceedings have already commenced, I hold that the defendants are not entitled to call on the performance bond and that the *status quo* should be preserved pending the final disposal of the arbitration proceedings as the balance of convenience lies in the plaintiffs' favour.

In the circumstance of the case I come to the conclusion that the defendants have adopted an incorrect procedure in seeking to challenge the plaintiffs' application. Firstly the first defendant maintains that an injunction cannot be granted against them pursuant to the Perbadanan Putrajaya Act 1995 read together with the Government Proceedings Act 1956. Notwithstanding the plaintiffs' objection to such a contention, it is observed that the stand taken by the first defendant would tantamount to the plaintiffs not having a cause of action against them. Secondly the second defendant, *inter alia*, maintains that an injunction cannot be granted against them because they had assigned the performance bond to the first defendant. Notwithstanding the plaintiffs' objection to such a contention, it is also observed that the stand taken by the second defendant would also tantamount to the plaintiffs not having a cause of action against them.

If the above contentions of the defendants are taken to be correct, the proper procedure that should have been adopted by the respective defendants would be to invoke O. 18 r. 19 or O. 33 r. 2 of the Rules of the High Court 1980. In *Alor Janggus Soon Seng Trading Sdn Bhd v. Sey Hoe Sdn Bhd* [1995] 1 CLJ 461 the Supreme Court held at p. 475:

> The question that immediately comes to our minds is if the defendants are sure in their own minds that the plaintiffs have no *locus standi* or cause of action why did they not invoke O. 18 r. 19 or O. 33 r. 2 of the Rules of the High Court, 1980 because if they succeed in their applications on any of these orders the civil suit and the injunction itself would both collapse. We would demostrate why invocation of O. 18 r. 19 or O. 33 r. 2 is the correct procedure by reference to authorities.

As a matter of record, it is to be noted that the project is now fully completed and the housing units have in fact been issued with the certificate of fitness of occupation.

An order in terms of the plaintiff's application is hereby granted. This is an interim order pending the final disposal of the arbitration proceeding.